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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 72-6580

OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL UNION LOCAL 685, AFL-CIO,

Petitioner

v.

TEXACO, INC.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No.

OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL UNION LOCAL 685, AFL-CIO,

Petitioner

v.

TEXACO, INC.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Operative Plasterers and Cement Masons International Union Local 685, AFL-CIO (herein the union or Plasterers) prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on January 15, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 472 F.2d 594, 82 LRRM 2384 (Appendix C). The opinion of the District

Court is reported at 343 F.Supp. 267 (Appendix D). A companion case, National Labor Relations Board v. Lafayette Building and Construction Trades Council, AFL-CIO et al, is reported at 445 F.2d 495. (Appendix F) The Recommended Decision of the Trial Examiner and decision of the National Labor Relations Board is reported as Lafayette Building & Construction Trades Council, AFL-CIO et al, 176 NLRB 979 (Appendix E).*

JURISDICTION

The judgment of the Court of Appeals was entered on January 15, 1973 (Appendix B). The jurisdiction of this Court rests on 28 USC 1254 (1). Time for filing was extended to November 14, 1973 (Appendix A)

QUESTIONS PRESENTED

1. Whether the findings and decision of the National Labor Relations Board that the Union had violated Section 8(b)(4)(ii)(B) of the National Labor Relations Act, as amended (29 USC 158(b)(4)(ii)(B)) are conclusive and res adjudicata as to the liability of the union in a subsequent proceeding for damages by the charging party, Texaco, Inc., not directly affected by the actions, under Sec. 303 of the Taft-Hartley Act, 29 USC 187.

2. Whether the District Court erred in granting a partial motion for summary judgment based on the findings of the National Labor Relations Board as to the liability of defendant union.

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* In accordance with Rule 39 one appendix has been attached but divided into nine part serially lettered A through I.

STATUTE INVOLVED

Section 303 of the Labor-Management Relations Act (29 USC 187) and the section to which it refers, Section 8(b)(4)(ii)(B) of the National Labor Relations Act, as amended (29 USC 158 (b)(4)(ii)(B) and its proviso are at the statutory matrix of the controversy. Section 303 provides:

> "Sec. 303. (a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the National Labor Relations Act, as amended.
>
> (b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefore in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

Section 8(b) provides:

> "It shall be an unfair labor practice for a labor organization or its agents -
>
> (4) . . . . (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either

case an object thereof is: . . . .

> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, . . . Provided. That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; . . . "

NATURE OF REQUEST

This is a request for review of a decision of the United States Court of Appeals for the Fifth Circuit affirming per curiam the Judgment of the District Court for the Western District of Louisiana granting a motion for partial summary judgment and holding that a prior decision of the National Labor Relations Board, enforced by the Fifth Circuit that the union had violated Section 8(b)(4)(ii)(B) by threatening Dubois, a material supplier of Dresser Engineers, a subcontractor of Texaco, was res adjudicata on the issue of liability in the concurrent suit for damages by Texaco under Section 303. Trial was held only on the issue of damages with an award in excess of $24,000.00 (Appendix B, C and D)[1/]

1/ The District Court in its final judgment noted: "1. This court, or a jury unhampered, might not have found as the Board did that Delahoussaye threatened Dubois

(continued on next page)

STATEMENT OF THE CASE

Texaco, Inc. (herein Texaco) owns and operates a large processing and refining plant at Erath, La., some 25 miles south of Lafayette, La., known as the Henry Gas Plant. Texaco in early summer 1967 entered into a cost plus contract with Dresser Engineering, Inc. (herein Dresser), a non-union general contractor in the building and construction industry from outside the State for construction of a substantial addition to the plant. Dresser in turn contracted with Dubois Concrete Works, Inc. (herein Dubois), a small family held corporation at Abbeville, La., some 10 miles west of the plant, to supply ready mixed concrete, according to its specifications, on a fixed price per cubic yard basis. A union unrelated to the Plasterers, Local 106 Plumbers and Pipefitters of Lake Charles, La., established a picket line at the Dresser job site in Erath, La., around August 9, 1967 and continued picketing from then on. After delivering concrete in its own trucks during June and July, Dubois on the appearance of the picket sign ceased making delivery in its own trucks and thereafter delivered the mixed concrete at its plant site in Abbeville, into trucks leased by Dresser, referred to as "batching out". On September 7, 1967, Dubois refused to deliver any more concrete to Dresser informing Dresser "In view of what happened last night, I can no longer give you any

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1/ Continued

with an object of forcing or requiring Dubois to cease doing business with Dresser and that by such conduct respondent Plasterers violated Section 8(b)(4)(ii)(B) of the Act." (Appendix D, p. 14, fn. 1) 343 F. Supp -. 272 fn. 1.

concrete". (Appendix E, p. 28) Allegedly on August 29, 1967, the exact date unknown, respondent Plasterers through the business agent Delahoussaye, had a conversation with Dubois which the Board in overruling its Trial Examiner found constituted a threat. (Appendix E 20, 27-33) The Board made no finding that the alleged threats were responsible for Dubois ceasing batching and selling to Dresser.

On October 19, 1967, Texaco filed charges against petitioner and Lafayette Building & Construction Trades Council, AFL-CIO (herein The Council) alleging violation of Section 8(b)(4) of the Act. No charges were ever filed by Dubois or Dresser. On November 20th, the Board issued a consolidated complaint alleging both respondents had violated Section 8(b)(4)(i)(ii)(B), 29 USC 158(b)(4)(i)(ii)(B). Concurrently a petition for injunction pursuant to Section 10(1) of the Act, 29 USC 160(1), for a temporary injunction was filed in the United States Court for the Western District of Louisiana to restrain conduct of the respondents (Case No. 13,375). Both respondents, Plasterers and the Council, immediately on November 30, 1967, entered into a stipulation, approved and ordered by Judge Putnam of the District Court, providing that respondents including petitioner here will not "threaten, coerce or restrain Dubois, Texaco, or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require Dubois, Texaco, or any other person to cease using, selling, handling, transporting or otherwise dealing in the products of, or to cease doing business with Dresser". (Appendix G) This Order remained in effect until the final disposition of the proceedings before the Board and was complied with in full by the respondents. Prior to trial, the Regional Director for the

Fifteenth Region on March 14, 1968, approved settlement agreements in which the Council and the Plasterers agreed to cease and desist from the alleged conduct prohibited by Sec. 8(b)(4). (Appendix H)[2/] This agreement was lived up to by the Council and Plasterers and the Notices required were duly posted and distributed. Neither these settlements nor the Court agreement were ever violated. The Regional Director advised Texaco of the dismissal of the Complaint. (Appendix E p.25) Texaco declined to enter into the agreements of March 14, 1968 and on March 20, 1968 appealed the Regional Director's refusal to proceed further, and his approval of the settlement, to the General Counsel's Office in Washington, D.C. (Appendix I) Such appeal of Texaco is not required by the rules of the Board to be served or noticed to other parties and this curious document did not come into the possession of respondent Plasterers until the trial in September, 1968. The appeal of Texaco, which respondents were unable to answer for lack of notice, challenged the authority of the Regional Director to enter into the settlements, alleged that respondent Council had a history of unlawful conduct, referred to a previous reported case many years before, alleged that a climate of fear, unlawful activity, reign of terror, threats, shootings, bombings of automobiles belonging to the superintendent of Dresser at his residence; bombings of Texaco's property and of other local businessmen supplying Texaco or Dresser and mass picketing of Texaco's plant;

2/ Only one is included in appendix. Both unions entered into identical settlements.

and, anonymous threats of violence "were the order of the day during this period for local businessmen who were supplying Texaco and its contractors." (Appendix I, p. 58) It referred to this suit, then pending, and the Complaint suggesting that Plasterers had threatened and carried out such threats inferentially by the acts enumerated. (Appendix I) No such matters were contained in the Complaint (Appendix E). This imaginative indictment of the Plasterers went unanswered and nothing in it was ever suspected, much less proven with respect to the Plasterers.[3] On the

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[3] Plasterers union never engaged in any active dispute or picketing of Dubois, Dresser or Texaco. The only known dispute in the area up to October 17, 1967 was that of the unrelated union Local 106, Plumbers. The Council on October 17, 1967, a month and 10 days after Dubois stopped supplying concrete to Dresser, placed a picket sign on the hood of a parked automobile at a public road intersection leading to the plant and allowed it to remain for 2 or 3 weeks reading "We are protesting substandard wages and conditions of Dresser Engineers, Lafayette Building & Construction Trades Council". On the basis of the location of this picket line over one-quarter of a mile from the main gate of Texaco and the separate gates of the subcontractors, including Dresser, the Trial Examiner and the Board found a violation of 8(b)(4) by the Council. (Appendix E) There was no evidence that any of the 3 unions were acting in concert or in support of each other and the Trial Examiner so found specifically with respect to respondent Plasterers (Appendix E). The

(continued on next page)

basis of this appeals document the Appellate Division of the General Counsel's Office reversed its Regional Director's approval of the settlements and ordered trial. (Appendix E p. 25)

The Regional Director then reissued his original complaint. At the hearing in September, 1968, respondents by written motion again moved for approval of the settlements, which the Trial Examiner referred to the Board and the Board denied without opinion,after the close of the hearing (Appendix E p.26). The veteran Trial Examiner in his decision, after making specific credibility findings between the testimony of Dubois and Delahoussaye,

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3/ Continued

exaggerated allegations of violence, dynamiting, threatening phone calls, etc. if true, were never related to either respondent Council or Plasterers. On September 6th, the night before Dubois stopped all deliveries to Dresser, two vehicles owned by the superintendent of Dresser were dynamited at his home. Subsequently officers or members of Local 106 Plumbers were indicated and two convicted of this offense and sentenced to 20 years, without bond during appeal, reflecting the local climate. The convictions were reversed by the Supreme Court of Louisiana. State vs. Ray and Hayes, 259 La. 105, 149 So.2d 540 (1971). Officers and members, mostly Negroes, of Plasterers, if anything shared this fear. They were never suspected, investigated or accused of any such activity, except by the counsel for Texaco.

found that no threat was made by respondent Plasterers, concluding that "a fair preponderance of the credible testimony" failed to establish a violation of Section 8(b)(4) by Plasterers and that they had no dispute with any employer at Texaco or acted in concert with Local 106. (Appendix E p. 34). After exceptions by the General Counsel and Texaco, two members of the Board's panel reversed all of these findings and conclusions in a tortious chain of circuitous revolving findings and inferences. The third member would have approved the settlements in view of the minimal nature of the violations and absence of any pattern. (Appendix E p. 23). On petition for enforcement the Fifth Circuit Court enforced the Board's decision. NLRB vs. Lafayette Bldg. & Constr. Trades Council, (Appendix F)

The District Court suspended proceedings in the Section 303 damage suit pending conclusion of the NLRB proceedings. The Labor Board decision was rendered on June 24, 1969. Texaco then filed the motion for partial summary judgment in this proceeding on December 9, 1969 and after enforcement of the Labor Board order by the Circuit Court in its decision rendered July 1, 1971, the court granted the motion for summary judgment as to liability against defendant Plasterers on September 3, 1971. (Appendix D p. 10)

THE DECISION OF THE COURT OF APPEALS

The Court decided the matter on its summary docket without argument on January 15, 1973, holding that the decision of the National Labor Relations Board that the union had committed an unfair labor practice in violation of 8(b)(4)(ii)(B) of the Act is res adjudicata as to liability in this action at

law for damages under Section 303 of the Labor Management Relations Act. It mentioned but did not discuss its previous decision in NLRB vs. Lafayette Building & Construction Trades Council, 445 F.2d 495 (CA 5, 1971).

The Court noted "applying res adjudicata in this case may seem harsh, especially since there are some definite differences between Board and court proceedings, we feel the affirmance is compelled by the existing case law in this circuit." (Appendix C p. 8) It relied on, without discussing, the authority of Painters vs. Edgewood Construction Co., 416 F.2d 1081 (CA 5, 1969) and the case following it, H. L. Robertson & Assoc. Inc. vs. Plumbers Local 519, 429 F.2d 520 (CA 5, 1970); and affirmed the judgment for Texaco on the motion for partial summary as to liability of defendant Plasterers after issue was joined.

REASONS FOR GRANTING THE WRIT

I.
THE CIRCUIT COURTS OF APPEAL ARE IN CONFLICT

There is substantial and confusing conflict between the decisions of the Fifth and Ninth Circuits on the one hand and the Sixth Circuit on the other hand. Additional confusion exists in apparent unreconciled conflicting decisions on the same doctrines within the Fifth Circuit itself and parallel decisions of the Sixth Circuit itself. This is compounded by alternate application of either of the related doctrines of collateral estoppel or res adjudicata. To further obscure practitioners, the application of either doctrine to damage suits under Section 303 based on findings by the Board in unfair labor practice proceedings resting on Section 8(b)(4) apparently conflicts with the principles

enunciated in this Court's decision in Longshoremen & Warehousemen's Union vs. Juneau Spruce Corp., 342 U.S. 237, and two long standing decisions of the 6th Circuit on which this Court denied certiorari, United Brick & Clay Workers vs. Deena Artware, 198 F.2d 637 (CA 6, 1952), cert. den. 344 U.S. 897, rehearing den. 344 U.S. 919; NLRB vs. Deena Artware Inc., 198 F.2d 645 (CA 6, 1952), cert. den. 345 U.S. 906.

The Fifth Circuit in the instant case rested its decision squarely on its earlier case, the first to apply the doctrine of res adjudicata in this type of case. Cf. Painters District Council vs. Edgewood Construction Co., 416 F.2d 1081 (CA 5, 1969). H. L. Robertson & Assoc. Inc. vs. Plumbers Local Union 519, 429 F.2d 520 (CA 5, 1970) followed. Both cases hold that the findings of a final decision of the Labor Board finding acts contrary to Section 8(b)(4) of the National Labor Relations Act should be accorded the doctrine of res adjudicata in subsequent proceedings for damages under Section 303 of the Taft-Hartley Act. Robertson allowed attorneys fees as part of the damages. In neither case were writs of certiorari applied for. The court then seemed to digress in Rachal vs. Hill, 435 F.2d 59 (CA 5, 1970), cert. den. 403 U.S. 904. There the district court had granted summary judgment in a civil action for damages for violation of the Security & Exchange Act of 1934 and the Security Act of 1933 based on the findings in a prior injunction action brought by the Security & Exchange Commission that defendant had violated the securities law. On appeal, the Fifth Circuit held that the doctrine of collateral estoppel did not preclude relitigation of the issues in the civil actions brought by strangers to the injunction action

despite factually identical issues. The court based its reversal of the summary judgment on the principle that the issue of liability had been decided by the district court sitting without a jury in the SEC injunction proceeding and that the parties in the subsequent civil proceeding for damages were entitled to a trial by jury as a matter of right under the 7th Amendment to the Constitution and Rule 38 although the defendants had not yet demanded a jury trial.

The 9th Circuit in Paramount Transport Systems vs. Chauffeurs, Teamsters & Helpers Local 150 etc., 436 F.2d 1064 (CA 9, 1971) applied the doctrine of collateral estoppel to the findings of a Trial Examiner finalized by failure to file exceptions, to the subsequent damage suit proceeding under Section 303.

The 6th Circuit on the other hand in Riverton Coal Co. vs. United Mine Workers, 453 F.2d 1035 (CA 6, 1972), cert. den. 407 U.S. 915, refused to follow previous decisions of the National Labor Relations Board as controlling in damage actions under Sec. 303, at 453 F.2d 1042 citing this Court's opinion in Longshoremen & Warehousemen's Union vs. Juneau Spruce, supra; its two Deena Artware cases, supra; and Old Dutch Farms Inc. vs. Milk Drivers, 281 F.Supp. 971 (ED NY 1968). Most recently the same Circuit in International Wire vs. Local 38 IBEW, No. 72-1688, decided March 20, 1973, ___F.2d.___,[4/] (CA 6, 1973) without discussing its previous Riverton

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[4/] Cert. applied for June 18, 1973 No 72-1707 Denied. October 9, 1973 84 LRRM 2422

decision, the Fifth Circuit decisions, or its previous Deena Artware decisions, applied the doctrine of collateral estoppel in affirming a summary judgment to bar an action for damages under Section 303 after the decision of the N.L.R.B. finding that the defendant had not engaged in unfair labor practices contrary to 8(b)(4). A district court in the 6th Circuit has followed the rule as enunciated in that circuit by Riverton Coal vs. United Mine Workers of America, supra, Gillespie vs. Pipefitters Local 120 (DC ND Ohio, 1971), 81 LRRM 2538. Other district courts in other circuits have refused to follow either the doctrine of res adjudicata or collateral estoppel to findings by the NLRB of violations of Section 8(b)(4) in subsequent 303 damage suits; Old Dutch Farms, Inc. vs. Milk Drivers Local 584, supra. See also cases distinguished by Painters District Council vs. Edgewood at 416 F.2d at 1085.

II.

THE APPLICATION OF THE DOCTRINE TO SHORT CIRCUIT TRIAL OF CIVIL DAMAGE SUITS BASED ON DECISIONS OF THE NLRB IS IN ERROR.

This decision and the earlier case on which it is bottomed, applying the doctrine of res adjudicata to Section 303 damage suits on the basis of previous findings by the NLRB, we suggest, results from a misinterpretation of this Court's decision in United States vs. Utah Construction & Mining Co., 384 U.S. 394 (1966) and a failure to properly weigh the previous decision of this Court in Longshoremen & Warehousemen's Union vs. Juneau Spruce, supra, and to properly appraise the long recognized holdings in United Brick & Clay Workers vs. Deena Artware, Inc., supra, and NLRB vs. Deena Artware, Inc., supra. The Circuit

Court, as did the District Court, rested its decision squarely on its earlier case of Painters District Council vs. Edgewood Contracting Co., supra, although it also cited H. L. Robertson & Assoc. Inc. vs. Plumbers Local 519, supra, which in turn was decided on the authority of the same case. Painters District Council, a final decision by the Board upon a charge filed by Edgewood, the plaintiff, in the 303 suit had found a violation of Sec. 8(b)(4). The court relying on the language of this Court in United States vs. Utah Construction Co., supra, at 384 U.S. pp. 421-422, (416 F.2d at 1083) found that the Board was acting in a judicial capacity and that the issues were properly before the agency and the parties had a full and fair hearing. It also cited from Professor Davis' Treatise on Administrative Law.

> "The unsound idea that res judicata does not apply to administrative determinations is gradually being replaced by the sound idea that res judicata properly applies to some administrative determinations and that degrees of relaxation of res judicata are often appropriate. The movement is toward a recognition that the reasons behind the doctrine of res judicata are fully applicable to some administrative proceedings, partially applicable to some, and not at all applicable to others." 2 Davis Administrative Law #18:12 (Supp. 1965) (416 F.2d at 1084)

It distinguished the Deena Artware cases, supra, solely on the basis that, although the findings were directly contradictory, the cases reached the Court of Appeals contemporaneously and held that

". . . inconsistent fact findings on the same issue is a different problem from whether the courts lack power to prevent relitigation of the same issue in the first instance."

It then went on to find that the fact that an unfair labor practice proceeding is not a condition precedent to a civil suit and that the remedies are independent, does not deny the court the power to apply the doctrine of res adjudicata. (416 F.2d at 1085)

The court mentions Longshoremen & Warehousemen's Union vs. Juneau Spruce, supra, but failed to note the holding of this Court that "the fact that the two sections have an identity of language and yet specified two different remedies is strong confirmation of our conclusion that the remedies provided were to be independent of each other". (242 U.S. at p. 244). The court also failed to note the radical distinction between the nature of the proceeding and statute in United States v. Utah Construction & Mining Co., supra, and the remedy procedure and provisions of the statute in Sec. 8(b)(4) and Section 303. In Utah, this court was construing a particular statute, a suit under the Tucker Act and the finality of the administrative fact findings of the dispute clause in a contract under the provisions of the Wunderlich Act of 1954. (384 U.S. at 399 Fn. 3) These Acts specifically provided that all disputed questions of fact arising under the contract would be decided by the contracting officer and this court had previously held in interpreting the Act that the review was limited to the administrative record, 384 U.S. at p. 420. The decision properly rested on the agreement of the parties as the court noted and then discussed "general principles of collateral estoppel", 384 U.S.

at p. 421, but did not in any way indicate that such remedies could be applied in the distinctly separate types of proceedings, remedies and forums of the Board and the Courts provided by Section 8(b)(4) of the National Labor Relations Act, as amended, and Section 303 of the Taft-Hartley Act.

In relying on the above quotation from Davis' Treatise on Administrative Law, the Court failed to note that Davis had qualified his quoted suggestion by adding that the use of the doctrine should be avoided if there was any reason to believe there was not an adequate presentation before the agency, and secondly, that the stated doctrine should be relaxed in areas of "changing law, changing policy, changing facts, strong public interest in avoiding perpetuation of error or undesirable policy in some concrete context, need for equal treatment of parties whose circumstances are the same, and other subtle or complex factors in various combinations'. 2 Davis Administrative Law #18.12 p. 626. Davis, of course, was not speaking specifically to the clear congressional intended distinctions in the remedy and law of the two sections of this Act as early indicated by this court in the Juneau Spruce case. See also Section III infra.

III.

THE TWO SECTIONS HAVE A DIFFERENT PURPOSE WITH DIFFERENT RULES OF LAW, PROCEDURE AND REMEDY APPLICABLE AND THE APPLICATION OF THE DOCTRINE OF RES ADJUDICATA DENIES DEFENDANT SUBSTANTIAL DUE PROCESS AND OTHER RIGHTS UNDER FEDERAL LAW AND PROCEDURE.

A.

As this Court has pointed out, the Board is acting as a public agency in the public interest, not in the interest of any private person or group and is chosen as the instrument to assure protection from the described unfair labor practice in order to remove obstructions to interstate commerce; Amalgamated Utility Workers vs. Consolidated Edison, 309 U.S. 261 (1940). It does not create an administrative remedy for private wrongs, 309 U.S. 265-266, 268. It does not provide a private administrative remedy and provides no private rights to the victims of unfair labor practices. The only recognition of existence of private rights is within the public interest. In this respect the Labor Board is constituted to adjudicate the matters before it in a manner different from most other administrative agencies. Amalgamated Utility Workers vs. Consolidated Edison, supra; Local 283 vs. Scofield, 282 U.S. 205, (1965); Concrete Materials of Georgia vs. NLRB, 440 F.2d 61 at 67, (CA 5 1971). In the proceeding before the Labor Board, the dispute is between the Regional Director and the charged party and the only interest of the charging party, (Texaco here,) is to participate to the extent to see that his interest in the dispute will be considered. Concrete Materials of Georgia vs. NLRB, supra. Hence it is clear that the parties to the two proceedings are entirely different. Conversely the remedy sought by the Board and applied is solely in the public interest and is in the nature of injunctive relief providing for corrective action by cease and desist orders and such affirmative relief as necessary, including particularly in 8(b)(4) cases notification to members of the Union and the public of compliance with the law. It is not a penalty.

29 USC 160 (a). When considering alleged violations of Sec. 8(b)(4) the Board is not concerned with the effect of such actions whether direct or incidental. The statute speaks in terms of motive, purpose and object with regard to the actions of the union, and whether such actions are severely damaging or completely ineffectual is immaterial. Ramey Construction Co. v. Local 544 Painters, 82 LRRM 2442 (CA 5, January 31, 1973); Moore Dry Dock (Sailors Union of the Pacific), 92 NLRB 547; Superior Derrick vs. NLRB, 287 F.2d 891 (1960); NLRB vs. Intl. Rice Milling, 341 U.S. 665 (1951); Houston Insulation Contractors Assn. vs. NLRB, 357 F.2d 182 (CA 5, 1966). The consequences may be disastrous to the other party but if the activity is primary and permissible it is not an unfair labor practice. On the other hand, the consequences, i.e. the damage to a party or other persons, may be inconsequential or actually beneficial but if the object is secondary regardless of the means, whether crude or sophisticated, it is prohibited by Sec. 8(b)(4) and the Board applies its remedy. Superior Derrick vs. NLRB, supra; Local 74 Carpenters vs. NLRB 341 U.S. 707 (1951); NLRB vs. Denver Bldg. Trades Council, 341 U.S. 675 (1951); IBEW vs. NLRB, 341 U.S. 694 (1951).

On the other hand, Sec. 303 specifically gives a private right of action to a private party for damages sustained, a penalty imposed on the offending defendant. The action is at law and to maintain such action, the party must be able to demonstrate injury to his business or property by reason of the violation, 29 USC 187 (a) and (b); United Brick & Clay Workers vs. Deena Artware, supra. The effect of the acts, i.e. the injury or damage, creates the cause of action at law with all the substantive rights that flow from

such action. This important difference is emphasized by contrast. Other acts of unions defined as unfair labor practices are not made "unlawful" and no act of an employer defined as an unfair labor practice is made "unlawful". Hence civil damage suits cannot be brought and the jurisdiction of the court is usually pre-empted by that of the National Labor Relations Board. Motor Coach Employees vs. Lockridge, 403 U.S. 271 (1971) and cases cited therein.

B.

The legislative history of the Act clearly demonstrates the distinction between the sections. Section 303's reference to boycotts was offered as part of the amendments by Senator Taft on May 8, 1947, 93 Cong. Rec. p. 4900, and again reoffered and passed on May 9, 1947, 93 Cong. Rec. pp. 5059-5060. This amendment contained Sec. 303 (a) except that it spelled out the provisions of Sec. 8(b)(4) rather than incorporating them by reference. It also contained the provisions of Sec. 303 (b). After Senator Pepper had pointed out that he had just noticed that the amendment had not only made it an unfair labor practice to engage in a boycott or jurisdictional strike but also had made it "unlawful", Senator Taft confirmed that the definition was the same and that the effect of making the acts unlawful was that a suit for damages can be brought for that kind of thing. 93 Cong. Rec. 5060, May 9, 1947. In reply to questions by Senator Pepper, Senator Ferguson pointed out "Therefore all the amendment would do, if adopted, would be to create a cause of action for damages which could be heard before a jury in a Federal court. Is that correct?" Mr. Taft: "That is correct". 93 Cong. Rec. 5061, May 9, 1947. Thereafter Senator Taft inserted after the word "unlawful" in Sec. 303(a) the

words "for the purpose of this section" in order to meet objections of other Senators, 93 Cong. Rec. 5061, May 9, 1947. Senator Taft in submitting the original bill to Congress in his Senate Report No. 105 on Senate Bill 1126, 80th Congress, pointed out that the bill in addition to making secondary boycotts and jurisdictional disputes unfair labor practices also provided that the Board may seek injunctive relief. Senate Report No. 105, 80th Congress, p. 7-8.

The House Conference Report by the managers of the bill after the passage of the Senate amendments makes it clear that there are three distinct remedies provided by the compromise bill ultimately passed in this form. (1) Unfair labor practice proceedings by the General Counsel in the usual form under Sec. 8(b)(4)(A)(B)(C) and (D) (pp. 42-44); (2) mandatory interim injunctive relief for these unfair labor practices under Sec. 10(1) reserving "to private parties of any other remedy they might have in respect to such activities" (p. 57), and (3) a special civil action for damages under the new Sec. 303 (p.67). House Conference Report No. 501 on HR 3020, June 3, 1947, 80th Cong. 1st Sess. See also remarks of Congressman Lesinski, 93 Cong. Rec. pp. 7495-7495, June 19, 1947.

C.

Defendant had it anticipated the court application of the doctrine could have demanded a jury. Either party to the damage suit action is entitled to the right of a trial by jury upon a request timely made or in the discretion of the trial judge at any time. 28 USC Rule 38, 39. United Brick & Clay Workers vs. Deena Artware, supra; see Senator Ferguson and Senator Taft's comments, 93 Cong.

Rec. 5061, May 9, 1947.[5] Since this is a civil action at law defendant had the right to demand trial by jury under the 7th Amendment and consequently had a substantive right to have the jury resolve disputed questions of fact and draw the inferences.[6] In the absence of the jury these functions fall to the judge in an action at law.

Have defendants unwittingly sacrificed such fundamental rights by waiving the jury prior to

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5/ Compare the language of Sec. 303(b) and the language in the Federal Employers Liability Act giving rights to injured railroad employees, 45 USC 51, and this court's comments on the right of trial by jury. Shultz vs. Pennsylvania RR Co., 350 U.S. 523; Bailey vs. Central Vermont RR Co., 319 U.S. 350.

6/ Although defendant here did not seek a jury originally, the decision in Painters vs. Edgewood (October 7, 1969) intervened between the time of defendant's answer, January 22, 1968, and the motion for summary judgment on December 9, 1969. After the plaintiff obtained the summary judgment and was sure of winning against Plasterers, it substantially changed the posture of the case by dismissing the joint defendant Lafayette Bldg. Trades Council found by the Board to have actually engaged in picketing and to have an active dispute with Dresser, individual defendant Delahoussaye, and one count of the complaint as to defendant Plasterers (Appendix G).

any court of appeals applying the doctrine of res adjudicata or collateral estoppel to these types of cases and placing the matter in the hands of an experienced district judge familiar with the different rules of evidence and procedure in actions at law before the development and enunciation of the rule for the first time in Painters vs. Edgewood, supra, on Oct. 7, 1969. Were these substantial rights lost in deference to an agency following a different weight of the evidence rule with a different object in mind, i.e. the protection of the public by injunctive type cease and desist orders against conduct burdening commerce.

This case demonstrates the prejudicial difference in inferences that may be drawn by different finders of fact, with a different purpose. The Board's Trial Examiner found with respect to respondent Plasterers that "it had no quarrel with any employer at Texaco and it is nowhere shown that it acted in concert with Local 106 or in response to any requests from Local 106", including Dresser and Dubois, and that Plasterers were not in violation of 8(b)(4) (Appendix E p. 34). In the complaint the General Counsel had alleged that the Plasterers and Council had a labor dispute with Dresser in connection with the work being performed at the Henry Gas Plant (Texaco). (Appendix E p. 27) The Board, two members of the panel acting, overruled its examiner and found on the evidence considered as a whole, "the conduct of Respondent's agents . . . clearly suggests that there was in fact a dispute between respondent Plasterers and Dresser, although perhaps not as direct or active a dispute as that existing between Dresser and Local 106 Plumbers". They then went on to find that under the circumstances respondent Plasterers acted in aid of Local

106's dispute with the primary employer Dresser.[7] (Appendix E pp. 20-21) No such allegations were contained in the complaint. Local 106, if acting in concert with Plasterers, was likewise guilty of a violation of 8(b)(4) but they were not named or charged. There was no evidence direct or indirect in the record to substantiate such findings. It rested solely on inference of an agency seeking to protect the public interest. The jury or the judge, like the Trial Examiner, a veteran of many year's service in passing on the evidence, logically could have made different findings and drawn different inferences. See the District Judge's comment Footnote 2, supra, page 3. Defendant Plasterers was substantially prejudiced by the Circuit Court's

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[7] This reversal was based solely on inferences, including inferences of participation with a union not a party, who was not shown to have taken any action with regard to Dubois. To arrive at these inferences the Board members had to ignore the credibility finding of its experienced Examiner and the contrary reasons for his refusal to deliver given by Dubois to construe "a threat". Both the Board and the Court ignored this Court's caveat in Universal Camera Corp. v. NLRB, 340 U.S. 474, and NLRB v. Walton Mfg. Co., 369 U.S. 404. The Board recirculated the circumstantial evidence, speculated and was not following the test of suits at law provided by Federal Rule of Civil Procedure 52(a) requiring affirmance of the trier of fact's findings unless "clearly erroneous". The Circuit Court, after rejecting this suggestion in NLRB vs. Lafayette Bldg. & Constr. Trades

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doctrine, as applied in this case since the district judge, and presumably the jury if allowed, were not free to make their own findings and inferences from the evidence. Although this Circuit recognized the importance of this distinction in other administrative proceedings, it denies it in Section 303 damage suits vis-a-vis Section 8(b)(4) Labor Board injunctive type remedies. Compare Rachal vs. Hill, supra. The distinctive need of the Congressionally intended two forums, one a public agency - a public protecting remedy without penalty, the other a private suit - a private reward for plaintiff, a harsh penalty for defendant, is clearly illustrated in the history of this case.

D.

The test with respect to the weight of the evidence and procedural rules for substantial justice to the parties are different with respect to the NLRB and the federal courts. The findings of fact, inferences drawn by the NLRB and its conclusions cannot be interfered with by the Circuit Court on petition to enforce or review "if supported by substantial evidence on the record as a whole", 29 USC 160(e)(f) and (g). On the other hand, the evidentiary test of findings by judges sitting without jury is the "clearly erroneous" rule, 28 USC Rule 52(a). The Board does, however, despite this court's caution in Universal Camera Corp. vs. NLRB, 340 U.S.474,

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7/ Continued

Council AFL-CIO et al, 445 F.2d 495, the companion case, we suggest, had a duty to reconsider it in the Section 303 appeal, now the subject of this writ.

as in this case frequently overrule its Trial Examiner. Thus an additional exposure is added to the defendant. More importantly, the Board in its position as an agency acting in the public interest and to protect its investigative processes and its witnesses from discrimination refuses to disclose in advance of trial the names or statements of witnesses and documents which may be pertinent to respondent's defense. 29 USC 161, NLRB Field Manual Sec. 10292.4; 10394.7-10394.11. Only the formal records are disclosed and the statements of witnesses after they have testified in accordance with the Jenks rule. 29 CAF 102.117, 102.118, NLRB Field Manual Sec. 10394.7. No witnesses, statements obtained by investigators of the Board, or records are available through pretrial discovery or interrogatories. Since the charging party later plaintiff in 303, is not a real party at interest the same difficulty is encountered, nor are they always fully informed of the material in the Board's files. Since some witnesses and material is never used this remains forever hidden from defendant's eyes.

As demonstrated above, the Regional Director, the true party, is only concerned in an 8(b)(4) case with "the object or the purpose of the activity", not with its effectiveness vel non or resultant damages. Issues relating to the charging party, possible plaintiff in the civil damage suits, conduct which may have induced, provoked or aggravated the alleged unlawful activity of respondent are not the concern of the Board. Yet the question of actions that create liability on the part of the respondent may be so entwined that issues of effect, causation and damages that they become for evidentiary purposes inseparable and material to test the "unlawfulness" of defendant's action in the civil damage suit,

questions that should properly be submitted to the judge or jury. Since any person may file a charge, even one unaffected under Sec. 10(b), 29 USC 160(b), the real parties immediately affected by the actions of the respondent are often not even nominal parties to the case. The Board joins no other parties except respondents charged with unfair labor practices and no method is provided for respondent to bring all affected parties into the proceedings. Thus the respondent, made defendant in a subsequent damage suit, is deprived of its important procedural rights in the Federal Rules of Civil Procedure of pretrial discovery and interrogatories, cross claims or counter claims and interpleader of necessary parties; the disclosure of investigative material to which it would otherwise be entitled, the names of witnesses and since the Board limits its proof only to objective and may or may not call the charging party or other persons affected defendant is denied its rights of cross examination under Rule 43(b) of a true adverse party and his agents.[8/] In effect, by the Board protective rules, Respondent is fighting the battle against the

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8/ Respondent would have interpleaded Local 106, Plumbers and called for production of all Board records of its activity including charges dismissed, and the Board's statements of all Dubois and Dresser witnesses, particularly Mrs. Lifey Dubois, who did not testify in the NLRB proceeding had it been permitted to do so. Since the Board did not call all the persons it investigated, respondent assumes the risk if it calls them, of making them its witnesses, or using them without advance information about their statements.

other nominal party, on which depends the outcome of his subsequent civil damage suit, as to liability, with one hand tied behind his back.

IV.

DEFENDANT WAS DEPRIVED OF A FULL AND FAIR HEARING BY LACK OF OPPORTUNITY TO ANSWER TEXACO'S APPEAL FROM THE REGIONAL DIRECTOR'S APPROVAL OF THE RESPONDENT'S SETTLEMENT.

The rules of the Board and failure of Texaco by notification, to allow respondents to answer its appeal to the General Counsel (Appendix H) deprived petitioner Plasterers, then respondent, of an opportunity to answer the appeal and substantial due process. The Plasterers after immediately settling the 10(1) injunction suit, entered into a settlement agreement with the Regional Director after issuance of the complaint to abstain from all the alleged unfair labor practices and complied by posting the required notices to its members and others. This contained a non-admission clause. The Regional Director approved, finally disposing of the case. Under the Act, the sole discretion lies in the General Counsel whether to issue or proceed on a complaint (Sec. 3(d), 29 USC 153(d)). The effect of the approval of the settlement, the General Counsel, acting through his agent the Regional Director, exercised his final authority to decline to prosecute the complaint further. The appeal filed with the General Counsel to overrule the action of his Regional Director by Texaco contained exaggerated and unprovable allegations of violent threats and actions and previous violations inferentially attributed to respondent Plasterers, no evidence of which was ever

demonstrated. One basis of its objection to the informal settlement without trial was this very damage suit already filed by Texaco seeking $134,000.00 in actual damages for such unlawful action. While the private charging party has a right to be consulted and an opportunity to object to a proposed settlement (Leeds & Northrup Co. vs NLRB, 357 F.2d 527 (CA 3, 1966)), this same Fifth Circuit has ruled that it must present material issues of fact in its objection in order to obtain an evidentiary hearing; Concrete Materials of Georgia vs NLRB, 440 F.2d 61 (CA 5, 1971). The mere desire for an evidentiary hearing to support its private damage suit under Sec. 303 of the Act in order to take advantage of the principle of res adjudicata enunciated in the Painters District Council vs. Edgewood Contracting Co., supra, is not sufficient, 440 F.2d at p. 63.

The issue of Texaco's undisclosed appeal and the General Counsel's reversal of his Regional Director's approval and refusal to issue complaint was timely raised by respondent Plasterers by a special motion to approve the settlement agreement filed at the opening of the hearing with the Trial Examiner in September, 1968 (Appendix E). After referral to the Board by the Trial Examiner on October 16, 1968, after the close of the hearing, it was denied by telegram on November 8, 1968 (Appendix E). It was again renewed in exceptions to the Trial Examiner's decision and order and overruled by the Board in its decision on June 24, 1969, 176 NLRB 979 (Appendix E). The 5th Circuit in the proceeding on the petition to enforce discussed the setting aside of the settlement agreement and quoted the applicable rule (445 F.2d at p. 499, fn 4). The court failed to note, however, that under the rule Texaco was not required

and did not serve a copy of the appeal to the General Counsel on respondent Plasterers and respondent Plasterers was given no opportunity to reply to the exaggerated, false and unsubstantiated allegations of the appeal. The rule requires no service on respondent or other party, only on the Regional Director. 29 CAF 102.19.

On the petition to enforce the Circuit approached the appeal and the lack of notice to respondent from the viewpoint of the Board as a public agency enforcing a public right. It did not discuss the substantial prejudice to the respondent's private rights as the defendant in subsequent damage litigation to have a good faith officially approved settlement set aside without an opportunity to reply, and the prejudiced defendant suffered after it had complied, by being dragged through an expensive trial, winning before the Trial Examiner only to see the victory slip away on inferences and, we suggest, unfounded conclusions of two members of the Board. Nor did the Circuit discuss its earlier decision in Concrete Materials of Georgia, Inc., supra, or analyze the appeal, to question whether it raised any material facts, or the effect of this decision on the question of defendant's "private rights" in the 303 damage suit litigation. It rested its decision solely on the General Counsel's discretion as a public agency. In its later decision of January 15, 1973, it did not discuss the matter but apparently blindly assumed that a rule of "Fair and Full" hearing as it applies to a public agency, applies as well to the later private litigation.

V.

THE TWO RELATED DOCTRINES ENCOURAGE LITIGATION AND ARE CONTRARY TO PUBLIC POLICY FAVORING SETTLEMENT OF LABOR DISPUTES.

By its own definition requiring final action by the Board the Courts' application of the doctrines are uneven and inequitable. If respondent succeeds in obtaining administrative dismissal for lack of merit of the charges or concurrent dismissal after trial, it nevertheless is subject to a civil damage suit with the danger of being cast in judgment by the Jury or jury. United Brick & Clay Workers vs. Deena Artware, supra. If it settles, as here, and stops all activity after the filing of the Section 10(1) (29 USC 160 (1)) injunction proceeding and then settles the NLRB charges, it is still exposed, but receives full trial. Only if it tries the NLRB case first and fully and is successful do the doctrines apply to protect it from civil suit, International Wire vs. Local 38 IBEW, supra.

The doctrines ignore the public policy considerations of the statute and the public declared policy of the Board encouraged by the courts, 29 CAF 102.51. These doctrines encourage additional and continued litigation before and commands it after trial by the Labor Board rather than discouraging it. If action is delayed on the damage suit while the NLRB litigates, interest accumulates.

Once the recommended decision of the Administrative Judge (formerly Trial Examiner) has issued, compliance or settlement by the respondents is inadvisable since by complying or settling it waives its right to file exceptions to the recommended decision and the

decision becomes final. They are then exposed to these doctrines.[9] Paramount Transport Systems vs. Chauffeurs, Teamsters & Helpers, supra. After the Board decision, compliance or settlement again exposes respondent to the doctrines in the civil action. Painters District Council vs. Edgewood, supra. Respondent is thus given the unenviable choice, usually in a long dead labor dispute, of giving up its rights to full protection of the 7th Amendment and the rules of Civil procedure or continuing the expensive NLRB litigation. The public policy of encouraging compliance and settlements at later stages in the Labor Board proceeding is thus frustrated.[10] Alternatively it must demand a jury trial in every case.

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[9] The rule has a substantial peripheral effect before the NLRB. A lawyer must advise his client who is charged with a secondary boycott that it may be "safer" to settle, even when the violation is extremely doubtful and give up his right to a defense, rather than proceed to a hearing on the merits when an unfavorable ruling will mean res judicata in a 303 action.

[10] This case is an archtypical example of a long dead public interest and a long terminated dispute, if one existed. As early as Nov. 1967 the two respondents refrained from any further activity and complied with the stipulation prepared by the Regional Director and ordered by the Court. Thereafter when the Labor Board hearing was set Respondents entered into the settlements with the Labor Board, posted the required notices and lived up to them. Both respondents had fully complied with all of the subsequent requirements of the recommended order of the Trial Examiner and the

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Section 303 contains no statute of limitations. Since the charging party is neither a true party at interest (see Sec. III A, supra) nor the only party who may be injured, anyone may file contemporaneously under Sec. 303 (a)(b), or after completion of the Labor Board proceedings. The union is then faced with the application of res adjudicata or collateral estoppel, as to party to the NLRB case, and a retrial of the same issue against a new party or non-participant under the doctrines. The rights of the

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10/ Continued

Board when they issued. However, because of the setting aside of the settlement and existence of the vigorously prosecuted concurrent civil suit it was necessary to carry the NLRB matter through the trial, the Board and Court of Appeal, at great expense in time and money to defendants and the Government. Respondents declined to enter into a "formal" settlement which provides for the issuance of a Board order and Court decree because of legal uncertainty of its legal effect on the pending Sec. 303 damage suit, even with a non-admission clause in the settlement stipulation. This question has not yet been decided by the courts. The doctrines now force respondents to continue litigation after the initial hearing. Alternatively respondent is forced to settle early before trial with NLRB, despite meritorious defenses for fear of the application of the doctrines, and thus is deprived of a "fair" procedure.

defendant become dependent upon the whim and timing of injured parties plaintiff. Once the Section 8(b)(4) proceeding reaches Complaint, a settlement or compliance at any step from then on, becomes foolhardy. Defendant generally is fully exposed to either doctrine since the Board cannot give a release for "whoever is injured" of civil liability whether a participating party or not, and favors or requires a "confession type" settlement of Board and Court Order, 29 CAF 101.9. The only protection defendant has is the full evidentiary rules and proceedings applicable to a suit at law.

Any other doctrine frustrates the public policy of encouraging settlements except at the expense of respondent's rights.

CONCLUSION

For the reasons above stated, this petition for a writ of certiorari should be granted and the case set down for argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was served upon opposing counsel by mail on this 12th day of November, 1973.